



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

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ATTORNEY GENERAL

Travis C.

Honorable Harry Knox, Chairman
State Board of Control
Austin, Texas

0-2443

Dear Sir:

Opinion No. O-2443

Re: (1) Does the State have title and right of possession to cigarette tax stamps which have been delivered to Treasurer but have not been used or paid for?
(2) What formalities are necessary for an emergency purchase of cigarette tax stamps?

We have your letter of June 4, 1940, which reads as follows:

"In your opinion No. O-2339, your department gave as its opinion that the requisition given by the State Board of Control to the Steck Co. for 100,000,000 cigarette tax stamps, dated September 19, 1939, did not fulfill the constitutional requirements for State printing contracts, and that, therefore, the invoices for these stamps could not be legally approved for payment by the Board of Control.

"All of the tax stamps printed under this requisition have been delivered to the State Treasurer. At the present time, the Treasurer has on hand approximately 31,000,000 of the 100,000,000 stamps printed under this requisition.

"In view of these facts, your valued opinion is respectfully requested on the following questions:

"1. Does the State of Texas now have title and the right of possession to the above-mentioned tax stamps which have heretofore been delivered to the State Treasurer, but which have not yet been used?

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"2. If your answer to the above question is 'no', and assuming that an emergency caused by the lack of tax stamps for sale by the State will thereby be created, what formalities will have to be observed by the Board of Control in order to secure legally a sufficient supply of such stamps to last for the duration of said emergency?"

You have heretofore furnished us for examination the original contract between the State Board of Control and The Steck Company executed July 6, 1937, whereby The Steck Company agreed to deliver 300,000,000 cigarette tax stamps to the Cigarette Tax Stamp Board. You have also furnished us with a photostatic copy of the requisition, dated September 10, 1939 and approved September 19, 1939, whereby the additional 100,000,000 cigarette tax stamps referred to in your letter were purported to have been contracted for. Although, as pointed out in our opinion No. 0-2339, the contract of July 6, 1937 had expired, and the requisition approved on September 19, 1939 did not fulfill the constitutional requirements, it cannot be questioned but that it was the intention of the contracting parties that the purchase of the additional 100,000,000 stamps should be governed by the terms and conditions of the contract of July 6, 1937. Paragraph VI of said contract reads as follows:

"That in consideration of the party of the second part fully performing and keeping each and every obligation on its part, and the delivery of such stamps within the time and in the manner as provided in this contract or memorandum of agreement, together with the specifications, the party of the first part, agrees to pay to the party of the second part eleven and ninety-five one hundredths (11 95/100) cents per thousand for each and every thousand of said stamps delivered by the party of the second part to the party of the first part if and when accepted by the party of the first part at Austin, Texas, and an additional \$100.00 for each change of denomination." (Emphasis ours)

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It is apparent from the above quoted provision, that it was the mutual intention of the Board of Control and The Steck Company, when the requisition for the additional 100,000,000 stamps was approved, that payment in cash was contemplated upon delivery of the stamps "if and when accepted". We must look, therefore to the rules governing cash sales, as distinguished from sales on credit in order to ascertain where the title and right of possession of these stamps now resides in the light of our ruling in Opinion No. O-2339 that the requisition of September 1939 did not fulfill the constitutional requirements for a contract for printing.

James, C.J. in *Ewing v. Sylvester*, 94 S.W. 408 (Ct. of Civil Appeals, 1906) announced the rule relating to passage of title in cash sales which has been consistently followed in Texas:

"Where personal property is sold, a part of the consideration to be paid in cash and the rest in agreed payments, no title passes until the cash payment is actually made. Where a sale is made on the condition that a cash payment shall be made, and possession of the property is obtained before such payment, without the cash payment being waived, title does not pass. A waiver must be made voluntarily, and it is a question of fact that must be made to clearly and plainly appear ... Mechem on Sales, sec. 545, states: 'Where a sale is thus to be for cash and payment is found to be a condition precedent, it is clear that if the buyer obtains the goods by giving for the price a check or draft which is subsequently dishonored, there is no payment, and the title does not pass.' ..."

In *First National Bank of Littlefield v. Neel*, (Ct. of Civil Appeals, Amarillo, 1928), 10 S.W. 2nd 408, the court held that title to 45 bales of cotton had not passed to buyer where the buyer's bank draft given in payment therefor was not honored, even though the cotton had been delivered to buyer.

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"In Continental Bank and Trust Company v. Hartman (Tex. Civil Appeals) 129 S.W. 179, Talbot, J. held that, where a sale is for cash, a delivery subject to the payment of the price passes no title."

Bond, J. of the Dallas Court of Civil Appeals in Williams v. Greer, 122 S.W. 2nd 247, at p. 249 quoted with approval the following pronouncement of the Pennsylvania Court in Frech v. Lewis, 218 Pa. 141, 67A. 45:

"Possession, however, having passed and the buyer, by the act of the seller, having been invested with the indicia of ownership, the policy of our law requires that this situation - the possession in one and the right of property in another - shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right, in such case, to reclaim his goods; but he must do so promptly; otherwise he will be held to have waived his right, and can only thereafter look to the buyer for the price."

A question quite similar to the one here presented was before the Texas Commission of Appeals in Stieff v. City of San Antonio, 130 Tex. 594, 111 S.W. 2nd 1086. There, the City of San Antonio had purchased a piano from the Walthall Music Company for \$1300 to be paid on delivery of the piano. After the piano had been delivered, the City Auditor in accordance with an ordinance refused to permit delivery of the warrant issued in payment therefore for the reason that the Walthall Music Company was indebted to the City for certain taxes.

Thereafter the Walthall Music Company was adjudged bankrupt, and the Stieff Co., who had shipped the piano to the Walthall Co. on consignment laid claim to the piano. Said the court:

"The city, having thus acquired possession of the piano, asserts the right to keep it without paying for it, as it solemnly promised to do. The city was not misled, deceived, or de-

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frauded; it received the piano contracted for. The city has paid nothing, given up nothing, suffered nothing. There is no semblance of an estoppel in favor of the city against the manufacturer, the owner of the piano. Thus there is no possible ground upon which the city can claim the title or right of possession of the piano."

Whether the Steak Company has legal title at this time or merely a right to repossession is relatively unimportant as indicated by the following quotation from *Peoples State Bank v. Brown*, 80 Kansas 520, 103 Pac. 102, 23 L.R.A. (N.S.) 824, 31 A.L.R. 587:

"As a practical necessity, to avoid the inconvenience of requiring the seller of an article to keep one hand upon it until with the other he grasps the currency tendered in payment, there must be some relaxation of this rule. Delivery and payment, as a practical matter, cannot be absolutely simultaneous. Some slight interval between the two acts is inevitable, and the criterion upon which the courts have agreed with substantial unanimity is that such interval does not conclusively prove a total abandonment of title and the right of possession by the seller, unless, under all the circumstances of the case, it in fact shows that result to have been intended. Some ingenuity has been exercised with doubtful profit in defining the character of the right remaining in the seller after delivery and before payment. Whether it is more properly described as a lien, a retention of title, or an option to rescind the contract, is not very important so far as affects the solution of the problem presented here. It is a right of the seller to repossess himself of the goods if the buyer fails in the performance of the agreement on his part which was intended to be contemporaneous with the delivery. It is a peculiar right growing out of a peculiar situation, and it is not

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necessary to give it a name the use of which might seem to decide controversies growing out of other relations."

Applying the rules announced in the foregoing authorities to the fact situation presented in your letter, it is our opinion that the Steck Company has the right to demand return of the cigarette tax stamps recently delivered to the State Treasurer upon being advised that the contract and requisition under which they were presumably delivered is invalid. The seller's right of repossession of goods delivered but not paid for on a cash sale must be exercised within a reasonable time and may be waived by lack of diligence or agreement of the parties.

We turn now to a consideration of your second question. As stated in our opinion No. 0-2539, all contracts for printing, whether in cases of emergency or not must conform to the requirements of Article 16, Section 21 of the Constitution of Texas, of which the pertinent provisions are that the printing "shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations, as shall be prescribed by law ... and all such contracts shall be subject to the approval of the Governor, Secretary of State and Comptroller."

In the event of an emergency, Article 618, Revised Civil Statutes, 1925, provides:

"The Board may in its discretion make such temporary arrangement to meet the emergency as the public interest may demand."

Assuming that the Board of Control, in the exercise of its reasonable discretion, determines that an emergency now exists which requires the immediate purchase of cigarette tax stamps, it is our opinion that the Board may enter into a contract for the purchase of such stamps from the lowest responsible bidder after such advertising for bids as the Board may deem proper.

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In such emergency, it is not necessary that the requirements of Article 608 for six weeks advertising in six newspapers be followed. Article 16, Section 21 of the constitution must nonetheless be complied with, so that such contract must "be given to the lowest responsible bidder" and "be subject to the approval of the Governor, Secretary of State and Comptroller".

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Walter R. Koch*
Walter R. Koch
Assistant

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APPROVED JUN 11, 1940

Gerald B. Mann
ATTORNEY GENERAL OF TEXAS

